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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD ANDREAS, an individual; JERRY T. KEEFHAVER JR., an individual; CHARLES BONECK, an individual; WILLIAM HART, an individual; KEN BECKER, an individual; on behalf of themselves, and on behalf of all others similarly situated, Plaintiffs, vs. LOWE'S HIW, INC., a Washington Corporation authorized to do business in the state of Nevada, and DOES 1 through 100, Inclusive, Defendants.	Case No. 3:07-CV-00253-LRH-RAM **CLASS ACTION** **PLAINTIFFS DONALD ANDREAS, JERRY T. KEEFHAVER, CHARLES BONECK, WILLIAM HART, AND KEN BECKER'S NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION, MEMORANDUM OF POINTS AND AUTHORITIES** **Hearing** Date: TO BE SET BY THE COURT AS NECESSARY Judge: Hon. Larry R. Hicks

NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

Notice is hereby given that plaintiffs Donald Andreas, Jerry T. Keefhaver, Jr., Charles Boneck, William Hart and Ken Becker hereby move for an order certifying this action to proceed as a class action and ordering notice be given by U.S. Mail to potential class members. This motion to certify is made pursuant to Rule 23 of the Federal Rules of Civil Procedure (FRCP). Argument on this motion will be heard pursuant to an Order by the Court.

By this motion, plaintiffs Donald Andreas, Jerry T. Keefhaver, Jr., Charles Boneck, William Hart and Ken Becker seek to certify the following defined class:

> 1) All persons employed by Lowe's HIW, Inc., with the job title of "Specialists" from March 17, 2004 to March 31, 2006, who were paid according to Lowe's HIW, Inc.'s "Salary Plus Overtime Program,"and were not paid one and a half times their hourly rate for hours worked in excess of forty hours in a work week.
>
> 2) All persons employed by Lowe's HIW, Inc., with the job title of "Loss Prevention & Safety Manager" who worked in excess of forty (40) hours in a work week in the State of California at any time from March 17, 2004 to the present who were not paid overtime compensation for those excess hours.
>
> 3) All persons employed by Lowe's HIW, Inc., with the job title of "Zone Manager" who worked in excess of forty (40) hours in a work week in the State of California at any time from March 17, 2004 to the present who were not paid overtime compensation for those excess hours.

The motion should be granted as the proposed class meets all the requirements for certification under Rule 23 including (i) the class representative's claims are typical of those of the other class members; (ii) the class is so numerous it would be impracticable to bring them all before the court; (iii) common questions of law and fact predominate; (iv) plaintiff and class counsel will adequately represent the class; and (v) a class action is superior to other methods for the fair and adequate resolution of the claims raised by the class under the California Labor Code and California Business & Professions Code section 17200.

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This motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the Declarations of Donald Andreas, Jerry T. Keefhaver, Jr., Charles Boneck, William Hart and Ken Becker James M. Treglio, David R. Markham, the Reply Memorandum to be filed in response to any opposition to this motion, and upon any additional evidence accepted by the Court in consideration of this motion.

Dated: January 30, 2008

CLARK & MARKHAM LLP

By: _____
David R. Markham, Esq.,
Attorney for Plaintiffs Donald Andreas, Jerry T. Keefhaver, Jr., Charles Boneck, William Hart and Ken Becker

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CERTIFY CLASS ACTION

I. INTRODUCTION

Plaintiffs Donald Andreas, Jerry T. Keefhaver, Jr., Charles Boneck, William Hart and Ken Becker respectfully move for an order certifying this action to proceed as a class action under FRCP Rule 23. Employment-based claims for failure to pay overtime and commissions due are exactly the type of claims typically certified to proceed on a classwide basis in numerous published decisions.

This motion is based upon three policies by the defendant, Lowe's HIW, Inc., that are unlawful. First, Plaintiffs base their motion on the Defendant's "Salary Plus Overtime" policy (hereinafter, SPO), whereby the Defendant's employees with the job title of "Specialist" earned (less than) half their hourly rate for weekly hours above forty (instead of time and a half as required by law). Plaintiffs additionally base their motion on the classification of the Defendant's employees with the job titles of "Loss Prevention & Safety Manager" (more senior security guards) and "Zone Manager" is proper under the Nevada Revised Statutes. The Court can determine the legality of these policies on a class-wide basis.

The proposed class consists of three subclasses. The first subclass (hereinafter the "SPO subclass") all persons with the job title "Specialists" who are or were employed by the Defendant, Lowe's HIW, Inc. (hereinafter "Lowe's"), from March 17, 2004 to March 31, 2006, and who were paid in accordance with Lowe's "Salary Plus Overtime Program."[1] This class consists of approximately 176 persons. The second subclass (hereinafter the "LPS Manager subclass") consists of 48 past and current "Loss Prevention and Safety Managers" (hereinafter LPS Managers) who provided security services to Lowe's stores. The last subclass (hereinafter the "Zone Manager subclass") consists of 48 past and current "Zone Managers," whose primary

[1] Because this policy, as implemented, paid the Specialists a lower hourly rate for every hour worked in excess of forty hours per week, Lowe's employees pejoratively referred to this policy as "Chinese Overtime." Decl. of Charles Boneck, ¶4; Decl. of Ken Becker, ¶4; Decl of Donald Andreas, ¶9; Decl. of Jerry T. Keefhaver, Jr., ¶8 and 9; Decl. of James M. Treglio (hereinafter "JMT"), Ex. 1, 106:1-107:16.

duty was to insure the smooth operation of various "Zones" in Lowe's Nevada stores. This case is brought under Nevada Law (the Nevada Revised Statutes) and was removed to this Court by the Defendant.

For the SPO subclass, Lowe's does not dispute that it paid each person with the title of "Specialist" a declining rate of overtime payment, whereby Lowe's decreased the hourly rate of payment for every hour in excess of forty hours per week worked, and then only paid half of that rate. Plaintiffs will show that this policy lead to class members being paid less than $7.73 per hours, rate of exemption for overtime under the Nevada Revised Statutes until July 2005.[2] Thereafter, the Plaintiffs will show that the SPO subclass members were then systematically denied the proper time-and-a-half overtime rate required by Nevada law.

For the LPS Manager subclass and the Zone Manager subclass, Lowe's does not dispute than either group worked overtime, or that they were not paid for the overtime they worked. Rather, Lowe's argues that these members of the putative subclasses were covered by the administrative and/or executive exemptions. As the plaintiff will show, Lowe's classifications under these exemptions are faulty, as its employees with the job titles of "Loss Prevention and Safety Manager" and "Zone Manager" spent 50% or more of their time on non-exempt job duties. The class claim is that the latter two positions were classified as exempt when, in fact, they should have been classified as non-exempt.

Plaintiffs Donald Andreas, Jerry T. Keefhaver, Jr., Charles Boneck, William Hart and Ken Becker are adequate class representatives. Plaintiffs Andreas, Boneck, Becker, and Keefhaver worked overtime for the Lowe's in Nevada and were all denied adequate overtime compensation under Lowe's SPO policy. Plaintiffs Andreas and Keefhaver were also Loss Prevention and Safety Managers for Lowe's in Nevada who worked overtime and were misclassified as exempt under the administrative exemption. Plaintiff Hart was a Zone

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[2] After July 2005, the Nevada Revised Statutes were revised, and the exemption based upon earning over one-and-a-half the minimum wage was eliminated for hours worked in excess of forty hours worked per week.

Manager for Lowe's in Nevada and was misclassified as exempt from overtime compensation, and was not paid overtime compensation.

Class counsel are adequate as they are experienced in class action litigation having represented literally thousands of consumers nationwide in various class actions and have litigated multiple wage and hour matters. A class action is superior to other methods for the fair and efficient adjudication of this controversy because the practices engaged in are common to all members of the class and judicial economy is not served by multiple actions with duplicative and repetitive testimony. For all these reasons and those set forth herein, Plaintiffs respectfully request an Order certifying the class and to give notice to potential class members.

II. APPLICABLE LAW TO CLASS CERTIFICATION

FRCP Rule 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

The party moving for class certification has the burden of proving that the class satisfies the prerequisites and a class action ground set forth in FRCP Rules 23(a) and (b). *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992).

Although the Court must engage in a rigorous analysis to determine whether all the prerequisites of Rule 23(a) are satisfied (*General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)), an extensive evidentiary showing is not required. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). All that is necessary is sufficient information for the court "to form a reasonable judgment on each requirement." *Id*. The court does not examine the merits of the case, and must accept as true the substantive allegations of the class claim. *Id*. at n.17. The procedures governing federal class actions under Rule 23 do not permit inquiries into the merits of class claims for relief. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Supreme Court explained that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. This also prevents the

inequitable practice of "one-way intervention"; *i.e.*, where unnamed class members cannot opt-out of any suit in which the merits are decided adversely to their interests. *See Hudson v. Chicago Teachers Union* , 922 F.2d 1306, 1317 (7th Cir. 1991).

In *Eisen*, the High Court expressed its agreement with *Miller v. Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971), which held that a trial court should not consider the substantive merits of a claim for relief when passing on a motion for a class action. In *Miller*, the Court emphasized that the propriety of a class action is "basically a procedural question" and that "[a] suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action." 452 F.2d at p. 427. The Supreme Court concluded in *Eisen*:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.
> *Eisen*, 417 U.S. at 178 (*quoting Miller*, 452 F.2d at 427).

While plaintiffs believes they will most certainly prevail on the merits, this motion appropriately focuses on the satisfaction of the requirements of Rule 23.

III. FACTUAL BACKGROUND

A. SPO Subclass

At some point during their employment with Lowe's, Plaintiffs Charles Boneck, Ken Becker, Jerry T. Keefhaver, Jr., and Donald Andreas were enrolled in Lowe's "Overtime Eligible Compensation Plan." Decl. of Charles Boneck, ¶4; Decl. of Ken Becker, ¶4; Decl of Donald Andreas, ¶9; Decl. of Jerry T. Keefhaver, Jr., ¶8 and 9. This program, also referred to as "Salary Plus Overtime" was used specifically for Lowe's employees who held the position of "Specialist." Decl. of JMT, Ex. 1, 26:8-16. Lowe's employees referred to the this program as "Chinese Overtime." Decl. of Charles Boneck, ¶4; Decl. of Ken Becker, ¶4; Decl of Donald Andreas, ¶9; Decl. of Jerry T. Keefhaver, Jr., ¶8 and 9; Decl. of JMT, Ex. 1, 106:1-107:16. Under the SPO policy, Lowe's employees with the "Specialist" job title who worked more than forty hours per week were paid half of their effective hourly rate.

The "Specialist" position was developed for "somebody that specializes obviously in a particular area." Decl. of JMT, Ex. 1, 10:10-19. Types of specialists included both sales specialists in particular areas, such in the area of appliance sales (Decl. of Ken Becker ¶2),

contractor sales (Decl. of Donald Andreas, ¶9), flooring, cabinets, plumbing, millwork, outdoor power equipment, live nursery, walls, and/or loss prevention (Decl. of Charles Boneck, ¶2). Decl. of JMT, Ex. 1, 11:23-12:9. Every Lowe's store in Nevada had a least one of the ten types of specialist during the class period. Decl. of JMT, Ex. 1, 121:16-122:23. During the putative class period (March 17, 2004 to present) there were approximately 16 Lowe's stores in the State of Nevada. Using their best estimate, plaintiffs believe this subclass to include a minimum of 176 individuals.[3]

All specialists worked some amount of overtime. Loss prevention specialists, as part of their job description, were *required* to work 48 hour weeks until March of 2006. Decl. of JMT, Ex. 1, 20:12-16, Ex. 3. Other types of specialists, such as appliance specialists and commercial sales specialists were also required to work overtime as part of their duties. Decl. of Becker, ¶7; Decl. of Andreas, ¶11. After March of 2006, specialists received one and a half times their hourly rate for every hour worked in excess of forty in a week. Decl. of JMT., Ex. 1, 73:23-74:3. Thus after March 2006, Lowe's was in compliance with Nevada law.

But prior to March 2006, Specialists who worked overtime were not paid one and a half times their hourly rate. See Decl. of Boneck, Ex. A (identified at Decl. of JMT, Ex. 1, 84:4-84:21). Lowe's SPO Policy worked as follows: Lowe's would calculate a specialist's hourly rate by dividing the total hours worked in that week by the employee's salary. See Decl. of Boneck, Ex. A. The more hours worked, the lower the hourly rate. Then using that hourly rate, Lowe's would calculate the effective hourly rate for that week, and then pay the employee half that amount for hours worked in excess of forty per week. See Decl. of Boneck, Ex. A. The end result of the SPO policy was that employees would often be paid less than $5.15 per hour (the Federal Minimum wage) for each hour of overtime worked. Decl. of JMT, Ex. 1, 78:19-80:24; Ex. 4 (examples of paystubs of Charles Boneck). For each additional hour of overtime worked, the lower the hourly rate that the employee would be paid, and the lower still the

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[3] Lowe's has, thus far, refused to state the total number of Specialists it employed in the State of Nevada during the class period. According to Lowe's 30 (b)(6) witness there were at least ten specialists in each of Lowe's 16 stores in Nevada during the class period.

amount of overtime compensation. Decl. of JMT., Ex. 1, 85:21-86:1. The class representatives experienced the ramifications of this policy first-hand. Decl. of Becker ¶5; Decl. of Boneck ¶5; Decl. of Andreas ¶11; Decl. of Keefhaver ¶7. This policy was used for all specialists employed by Lowe's in Nevada prior to March 2006. Decl. of JMT, Ex. 1, 86:2-12.

B. LPS Manager Subclass

Starting in December 2001, Jerry T. Keefhaver was hired by Lowe's to be a LPS Manager. Decl. of Keefhaver, ¶2. He held that position until May 2005. Decl. of Keefhaver ¶9. Donald Andreas was employed by Lowe's as a LPS Manager from March 2004 to March 2005. Decl. of Andreas ¶2. The job description and performance guide created by Lowe's for the LPS Manager position are Exhibits 5 and 6 to the Declaration of JMT, respectively. In all, there were 32 LPS Managers employed by Lowe's in the State of Nevada during the putative class period. Decl. of JMT, Ex. 2.

According to the job description provided by Lowe's (Decl. of JMT, Ex. 5), the duty of the LPS Manager is to "protect customers, employees and company assets." LPS Managers worked to prevent theft and vandalism. Decl. of Keefhaver ¶3; Decl. of Andreas ¶3. LPS Managers do not set store policies or procedures, rather they implement policies of their supervisors at each store. Decl. of JMT, Ex. 1, 143:8-23. They do not have the ability to determine their budget, the number of people working in a store, nor do they have the ultimate responsibility in controlling inventory. Decl. of JMT, Ex. 1, 145:15-148:18. That responsibility rested in the Store Manager: all the LPS Manager could do is recommend changes to policies or inventory which the Store Manager would have to approve. Decl. of Keefhaver ¶4; Decl. of Andreas ¶4; Decl. of JMT, Ex. 1, 148:10-17. LPS Managers did not supervise anyone. Decl. of Andreas ¶4; Decl. of Keefhaver ¶4.[4]

All exempt managerial positions at Lowe's, LPS Managers included, were required to work a minimum of 48 hours per week. Decl. of JMT, Ex. 1, 179:9-15; Decl. of Keefhaver ¶5;

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[4] The 30 (b) (6) witness for Lowe's testified that in some circumstances, LPS Managers do give some instruction to retail employees, but appeared to confuse LPS Manager, with a "Department Head," who was an hourly non-exempt employee, Decl. of JMT, Ex. 1, 152:19-153-3.

Decl. of Andreas ¶5. These work schedules were set by Lowe's corporate office. Decl. of JMT, Ex. 1, 178:25-179:8.

Thus, the Court can adjudicate at trial whether Lowe's LPS Managers were properly classified as exempt under Nevada law.

C. Zone Manger Subclass

Plaintiff William Hart worked for Lowe's in Nevada as a Zone Manager from March 2003 to October 2004. Decl. of Hart, ¶3. The job description and performance guide created by Lowe's for the LPS Manager position are Exhibits 7 and 8 to the Declaration of JMT, respectively. In all there were 183 persons employed as "Zone Managers" in the State of Nevada during the putative class period. Decl. of JMT, Ex. 2. The "Zone" refers to a portion of a Lowe's store emcompassing several sales departments. Decl. of JMT, Ex. 1, 34:24-35:21.

According to the job description provided by Lowe's (Decl. of JMT, Ex. 7), the purpose of the Zone Manager is to be "responsible for achieving budgeted sales and margins in assigned area. Responsible for ensuring all corporate merchandising standards are maintained on a daily basis. . .responsible for overall safety, security, supervision, training, mentoring and scheduling of all assigned personnel. Support the Store Manager to ensure that superior customer service is provided across the store." For Plaintiff Hart, being a Zone Manager entailed overseeing the operations of a section, or zone of a store. Decl. of Hart, ¶4. But rather than supervising anyone, Hart spent most of his time doing the same work as sales associates: stocking, customer service and sales. Decl. of Hart ¶5.

In fact, Zone Managers are expected to assist in sales, stocking, cleaning, and general maintenance of their "zones". Decl. of JMT, Ex. 1, 38:25-41:16. As a Zone Manager, William Hart could not determine the prices of goods sold by Lowe's, nor could he hire or fire anyone, nor could he set any store policies, as those decisions were the sole province of the Store Manager. Decl. of Hart ¶5.

Zone Managers are required to work a minimum of fifty hours per week. Decl. of JMT, Ex. 1, 36:8-11; Decl. of Hart ¶6. These work schedules were set by Lowe's corporate office. Decl. of JMT, Ex. 1, 178:25-179:8.

IV. SUMMARY OF OVERTIME EXEMPTIONS UNDER NEVADA LAW

NRS 608.018 is Nevada's governing statute for overtime compensation. For the LPS Manager and Zone Manager subclass, the Court need only determine whether they were properly classified as exempt under the administrative and/or executive exemptions of NRS 608.018. Whether or not these subclass members worked overtime is a point readily conceded by Lowe's. See Decl. of JMT, Ex. 1, 36:8-11; Decl. of JMT, Ex. 1, 179:9-15.

Section 12.3 of Adopted Regulation of the Labor Commissioner clarifies how the Court could determine whether or not LPS Managers and Zone Managers are exempt under NRS 608.018. "The Commissioner will refer to 29 CFR §§541.1 and 541.2 to determine if an employee is employed in a bona fide executive or administrative capacity for the purposes of paragraph (e) of subsection 2 of NRS 608.018."

29 C.F.R. §541.100 defines the executive exemption as follows:

> (a) The term ``employee employed in a bona fide executive capacity'' in section 13(a)(1) of the Act shall mean any employee: (1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) Who customarily and regularly directs the work of two or more other employees; and (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. §541.200 defines the administrative exemption as follows:

> (a) The term ``employee employed in a bona fide administrative capacity'' in section 13(a)(1) of the Act shall mean any employee: (1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Further, 29 C.F.R. §541.201 (a) clarifies the term "directly related to the management or general business operations as:

> (a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase ``directly related to the management or general business operations'' refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the *running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.*
>
> (b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.
>
> Emphasis Added.

In this case, the administrative exemption is not appropriate here because both the Zone Manager and the LPS Manager positions worked within Lowe's retail establishment, and thus, does not meet the requirements under 29 C.F.R. §541.201. Therefore, only the executive exemption should apply. In determining whether the Zone Manager or LPS Manager positions were properly classified under the Executive exemption, the Court is to take into account that, "An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement." 29 C.F.R. §541.104 (c). As noted above, neither Hart, Andreas nor Keefhaver reported any ability to hire or fire anyone. That was the province of the Store Manager. Moreover, for the LPS Managers, in particular, their supervisory role, if any, appears to occur only in the absence of other managers, and thus, they should not be exempt.

Nonetheless, the Court, of course, need not consider whether these positions were exempt or non-exempt at this time. Rather, the Court need only consider whether it could, at some point in the future, determine the proper classification on a class-wide basis.

V. THE CLASS MEETS ALL THE REQUISITES FOR CERTIFICATION UNDER FRCP RULE 23.

A. SUMMARY OF LAW

The burden is on the party seeking to maintain the action as a class action to establish a prima facie showing of each of the 23(a) prerequisites and the appropriate 23(b) ground for a class action. *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975). In evaluating whether plaintiffs have met their burden, the court should accept the substantive allegations of the complaint as true. *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

At the certification hearing, the court looks to the pleadings and may consider extrinsic evidence to determine whether the Rule 23 requirements are met. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3D 473, 484 (2nd Cir. 1995). To be certified, a class action must satisfy the four prerequisites of typicality, commonality, numerosity, and adequacy of representation. See FRCP Rule 23(a). Following satisfaction of the Rule 23(a) requirements, a plaintiff must additionally satisfy one of the criteria contained in FRCP Rule 23(b) – ordinarily either "superiority" (Rule 23(b)(1)) or "predominance" (Rule 23(b)(3)).

Here, the class meets all the prerequisites of FRCP Rule 23(a), as well as 23(b)(1) *and* 23 (b)(3).

B. STEP ONE: RULE 23(a)

1. The Class is so Numerous That Individual Adjudication is Impractical

Numerosity does not require that joinder of all members be impossible, but only that joinder be impracticable. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994); FRCP Rule 23(a)(1); *See also, German v. Federal Home Loan Mortg. Corp.*, 885 F.Supp. 537, 552 (S.D.N.Y. 1995). Plaintiff does not need to state the exact number of potential class members, nor is a specific number of class members required for numerosity. 1 *Newberg* (4th Ed.) § 3:5 at pp. 233-235 and 246-247; *Arnold*, 158 F.R.D. 439. Rather, whether joinder is impracticable depends on the facts and circumstances of each case. *General Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980); *Schwartz v. Harp*, 108 F.R.D. 279, 281 (CD Cal. 1985). Here, the proposed class is, at least, 407 individuals (Decl. of JMT, Ex. 1 and 2). Thus, joinder is impracticable, demonstrating the substantial benefit of class treatment and an extraordinary

likelihood that a denial of certification will, as a practical matter, permit the waiver of the claims of hundreds of under-represented workers.

2. The Proposed Class Representatives will Adequately Represent the Class.

Rule 23(a)(4) requires that the proposed representative does not have conflicts of interest with the proposed class and that the representative is represented by qualified counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9 th Cir. 1998); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998). Mere divergence of opinion between the class and its representative(s) is not sufficient. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

In this case, there is no evidence of antagonism between the proposed representatives, or theri attorneys, and the putative class and, even if there were, any class member who wishes to "opt out" of the class will be afforded an opportunity to do so. Moreover, Plaintiffs' attorneys are experienced class action litigators in a firm devoted to the prosecution of wage and hour class actions such as this. See Decl. of David R. Markham. Plaintiffs and their counsel are willing to pursue this action vigorously on behalf of the class, have thoroughly investigated the claims of the class, and have engaged in the need discovery of employment litigation, "including document request and production, interrogatories, and the taking and defending of depositions." *Hanlon*, 150 F.3d at 1022.

3. The Proposed Class Representative's Claim Is Typical of That of the Class

Rule 23(a)(3) requires typicality, which the Ninth Circuit also interprets permissively. *Hanlon*, 150 F.3d at 1020. Typicality requires that the named plaintiff be a member of the class he represents and "possess the same interest and suffer the same injury" as class members. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982). The named plaintiff's claims need not be identical to the claims of the class to satisfy typicality; rather, the claims are typical if they are "reasonably co-extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. It is sufficient for plaintiffs' claims to "arise from the same remedial and legal theories" as the class claims. *Arnold*, 158 F.R.D. at 449; *California Rural Legal Assistance v.*

Legal Services Corp., 917 F.2d 1171, 1175 (9th Cir. 1990) [class representatives and members of the class need only "share a common issue of law or fact"].

Moreover, Rule 23's typicality and commonality (*discussed, infra*) requirements "tend to merge," and a finding of commonality ordinarily will support a finding of typicality. *Falcon*, 457 U.S. at 157 n.13; *Weyner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987) [observing a "necessary overlap of the provisions of Rule 23"]; *California Rural Legal Assistance*, 917 F.2d at 1175 [Rule 23 "does not require the named plaintiffs to be identically situated with all other class members. It is enough to share a 'common issue of law or fact.'"].

As stated in the Summary of Facts section above, the plaintiffs held the titles of "Sales Specialist," "Loss Prevention Specialist," "Loss Prevention and Safety Manager" and "Zone Manager" during the putative class period, and worked overtime without adequate compensation in all positions. Lowe's 30 (b) (6) Witness has testified that it was the Lowe's policy to have persons in these positions work overtime, and each representative and supporting documentation indicates that they did so.

4. Common Questions of Law Exist Between Plaintiff and the Class.

The common nucleus of operative facts results from Lowe's failure to adequately compensate its employees for overtime worked who held the position of "Specialist," and LPS Managers and Zone Managers who would qualify as a member of the proposed Class was subject to the same "exempt" classification by Lowe's. So long as class members assert a common complaint and demonstrate they are subject to the same harm, commonality exists.

The pleadings and evidence in this case are crystal clear that the alleged harm applies commonly to each member of the class. The Ninth Circuit construes the commonality prerequisite permissibly. *Hanlon v. Chrysler Corp.*, 150 F.3d at 1019. All questions of law and fact need not be common. *Id*. Rather, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id*.

As set forth in the Complaint at ¶8, the common question is:

- Whether Plaintiffs suffered injury by Lowe's failure to compensate the putative class members for the hours they worked in excess of forty hours in a given week;

From that core common question the subsidiary questions are as follows:

- Whether Lowe's "Salary Plus Overtime Policy" was a lawful method of computation of overtime compensation under the Nevada Revised Statutes 608.016 and 608.018;
- Whether Lowe's properly classified each LPS Manager and Zone Manager as "salaried exempt" from overtime compensation under the Nevada Revised Statutes;
- The effect upon and the extent of injuries suffered by Plaintiffs and other members of the classes and the appropriate amount of compensation.

All of these are common questions of law and/or fact as to each and every class member While the putative class here enjoys several common questions of law and fact, there "need be only a single issue common to all members of the class" to meet the commonality requirement. *In re American Medical Systems, Inc*., 75 F.3d 1069, 1080 (6th Cir. 1996). A common nucleus of operative facts alone is usually enough to satisfy the commonality requirement of Rule 23(a)(2). *Rosario v. Livaditis*, 963 F.2d 1013, 1017-1018 (7th Cir. 1992); see also *Hanlon v. Chrysler* ,150 F.3d 1011,at 1019 [common question requirement can be satisfied either by a shared legal issue with divergent factual predicates or by a common core of salient facts with disparate legal remedies.] Here the obvious legal questions are whether the SPO policy, as applied to Specialists, was lawful under Nevada law, and whether LPS Managers and Zone Managers were properly classified as "exempt" from overtime compensation under NRS 608.018.

Under federal law, the employer bears the burden of showing that an employee is exempt from overtime laws. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197 (1974). If individual overtime exemption issues could preclude class certification, as Lowe's may attempt to argue here, the proponent of an overtime class action would be forced to prove that the entire class was non-exempt whenever a defendant raises the affirmative defense of exemption. *See Romero v. Producer's Dairy Foods, Inc.*, 235 F.R.D.474, 486 (E.D.Cal.,2006)). Requiring a plaintiff to demonstrate that class members are not exempt is improper and would effectively reverse that burden. *Id*.

Just as in *Romero*, other courts have also found that the commonality requirement of Rule 23(a)(2) is satisfied where a putative class of employees challenges the employer's classification of those employees as exempt from overtime requirements under state labor laws. *Wang v. Chinese Daily News*, 231 F.R.D. 602, 607 (C.D. Cal. 2005); *Leyva v. Buley*, 125 F.R.D. 512, 515-16 (E.D. Wash. 1989).

As the *Wang* Court noted:

> The commonality preconditions of Rule 23(a)(2) are "construed permissively." See *Hanlon*, 150 F.2d 1019. "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Staton, 327 F.3d at 953 (9th Cir. 2003) (quoting Hanlon, 150 F.3d at 1019). Members of the class may possess different avenues of redress, but their claims must stem from the same source. See Hanlon, 150 F.3d at 1019.

Where Nevada law is silent on areas of its law, the Nevada Supreme Court has instructed that Courts should look to case law in its sister states, and the Ninth Circuit for guidance. *D.R. Horton v. Green*, 120 Nev. 549, 554 (2004). California, which has similar statutes for both overtime compensation and class certification is instructive here. The California Supreme Court, interpreting California's rules regarding class certification (which are based on Rule 23) held, "neither variation in the mix of actual work activities undertaken during the class period by individual [class members], nor differences in the total unpaid overtime compensation owed each class member, bars class certification." *Sav-On Drug Stores*, 34 Cal.4th 319, 335 (2004). "[C]onsiderations such as 'the employer's realistic expectations' and 'the actual overall requirements of the job' are likely to prove susceptible of common proof." *Id.* at 336. The same is true here.

C. STEP TWO: RULE 23(b)

Once a plaintiff has satisfied the Rule 23(a) preliminary requirements of numerosity, commonality, typicality, and adequacy of representation, he must demonstrate that the proposed class action qualifies under one of the sub-sections of Rule 23 (b). In this case, plaintiff has sought certification under Rule 23 (b)(1) and Rule 23 (b)(3). Though plaintiff can satisfy both elements, it is sufficient for certification that he satisfy only *one*.

1. Class Adjudication Is Superior To All Other Forms.

Under Rule 23 (b)(1), a plaintiff must establish, "that class action treatment is the preferable method of handling a case." This is shorthand for the actual rule, which states that Class Actions are appropriate when: (1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, **or**

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Rule 23 (b)(1)(A-B).

Basically, what the so-called Superiority element represents is the principle that Class adjudication is appropriate when prosecution of individual actions might lead, from case to case, to contradictory results, prejudicing the interests of either the defendant or members of the plaintiff's class. "To illustrate: separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations." See *Notes of Advisory Committee on 1966 Amendments*. Though the facts of liability are no different, different courts adjudicating the matter might reach conflicting conclusions.

Here, the consequences of varying outcomes are undesirable. There should be one decision as to the legality of Lowe's SPO Policy, and one decision as to whether LPS Managers and Zone Managers are, in fact, exempt. This risk alone warrants certification so that the determination can be made once and for all and will bind all of the parties. *Amchem Products, Inc. v. Windsor* , 521 US 591, 614 (1997) [Rule 23(b)(1)(A) is satisfied "where the party is obligated by law to treat the members of the class alike, or where the party must treat all alike

as a matter of practical necessity."]. Applicability of an "exemption" to an entire class of employees performing the same functions should not be determined on a piecemeal basis.

Moreover, as a matter of public policy, class-wide adjudication of these claims is consistent with Nevada's goal of ensuring the well-being of the worker and the worker's family. The *Nevada Revised Statute* sections at issue concerning payment of wages due are minimum labor standards. When they are violated on an individual basis, the employer's successful violation only encourages further violations. Attacking the violation individually simply does not address the problem. When the violation is the same for many of the defendant's employees, the superior method of adjudication is not an individual action, but class wide adjudication. This ensures that the State's important public policy, and the rights of hundreds of workers and their families, can be vindicated, the violation corrected, and the law enforced. As noted by the Court in *Katz v. Carte Blanche Corp*.:

> [I]t must be remembered that the foundation of a class action is that it is "a semi-public remedy administered by the lawyer in private practice". (Kalven and Rosenfield, The Contemporary Function Of The Class Suit, 8 U.Chi.L.Rev. 684, 717 (1941)). It is often the only practical effectuation of remedial provisions of legislative policies. The action of Federal agencies entrusted with the enforcement of public policy is limited to compelling compliance with a statute. Private litigation, particularly in the form of a class action, serves to supplement administrative action in furthering the public policy. (See *J. I. Case v. Borak (1964), 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423*).
>
> 53 F.R.D. 539, 543 (W.D. Penn. 1971).

There can be no more appropriate use of the Class Action form than in the prosecution of a case involving the violation of important Nevada public policies impacting the rights of hundreds of individuals who were subject to the same treatment by Lowe's.

2. Issues Common To The Class Predominate Over Individual Issues

As an alternative to FRCP Rule 23(b)(1), under Rule 23(b)(3), a plaintiff must establish that the questions common to the class predominate over the questions affecting individual members. As noted by the Advisory Committee,

> Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. The Court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the

> questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. *See Notes of Advisory Committee on 1966 Amendments*.

Under Rule 23(b)(3), the moving party must demonstrate that common questions "predominate over any questions affecting only individual members" and that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." More plainly put, FRCP Rule 23(b)(3) "focuses on the relationship between common and individual issues." *Wang*, 231 F.R.D. at 613 [finding common questions of law and fact to predominate in an overtime misclassification case]; *See also*, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 627 (5th Cir. 1999) [predominance is determined not by counting the number of common issues, but by weighing their significance]. As explained in Newberg's treatise, while the meaning of "predominance" has remained enigmatic, at least "[m]ost courts have agreed on what the predominance test does not entail." 2 *Newberg* (4th Ed.) § 4.25 at p. 169. Specifically, as Professor Newberg explains:

> The test was not meant to require that the common issues will be dispositive of the controversy or even be determinative of the liability issues involved. ... In addition, the predominance requirement is not a numerical test that identifies every issue in the suit as suitable for either common or individual treatment and determines whether common questions predominate by examining the resulting balance on the scale. A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions. ... In finding that common questions do predominate over individual ones in particular cases, courts have pointed to such issues that possess the common nucleus of facts for all related questions, have spoken of a common issue as the *central* or *overriding* question, or have used similar articulations. ... Implicit in all these articulations of satisfaction of the predominance test is the notion that adjudication of the common issues of the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves. 2 *Newberg* (4th Ed.) § 4.25 at pp. 169-174 [*emphasis added*].

Lowe's payment scheme for Specialists is a written policy and practice that applies uniformly to some 176 subclass members. Further Lowe's misclassification of LPS Managers and Zone Managers as exempt from overtime is a policy and practice applied uniformly to each of the approximately 231 subclass members. The question whether that policy was lawful predominates over all other issues. Also relevant is the fact that (i) there would be no difficulty in maintaining this as a class action because the claims of each class member are relatively simple to adjudicate, (ii) this forum is appropriate since Lowe's itself chose this District by its

removal to Federal Court and because Lowe's employed Specialists, LPS Managers and Zone Managers in this District, and (iii) class members would likely have little interest in individually controlling the prosecution of separate actions since the amount in controversy for each class member will vary and in some cases may be too small to warrant individual litigation at all (e.g., Specialists, LPS Managers and Zone Managers employed for a short period of time by Lowe's). Moreover, it is very likely that currently employed Specialists, LPS Managers, and Zone Managers, unlike Donald Andreas, Jerry T. Keefhaver, Jr., Ken Becker, Charles Boneck and William Hart, may fear retaliation by Lowe's, in one form or another, should they attempt to bring their own the questions common to the class predominate over the questions affecting individual members.

For the Chinese Overtime subclass, the Court need only make a decision based upon the written policy of Lowe's as it relates to Nevada's overtime statutes. NRS 308.018. This statute requires that every non-exempt employee be paid one and a half times their hourly rate for every hour worked in excess of 40 hours per week. From July 1, 2005 to March 2006, Lowe's paid its employees using the Chinese Overtime system, that is categorically unlawful under 608.018. Moreover, during this period, Lowe's required its non-exempt Specialist employees to work a minimum of 48 hours per week.

For those Specialist employees employed prior to July 1, 2005, as the Plaintiffs Boneck, Becker, Andreas and Keefhaver were, the Court needs to undertake a slightly more complicated analysis. Prior to July 1, 2005, NRS 608.018 exempted those employees who earned more than one and a half times the minimum wage, which, throughout the period was $7.73 per hour. Under Section 12.2 the Adopted Regulation of the Nevada Labor Commissioner, however, the method of determining whether an employee earned enough to qualify for the exemption is to divide the salary by hours worked during a week. As the Court will note in its review of Exhibit 4 to the Declaration of JMT, there are numerous instances where the hourly rate of Specialist employees fell well below the $7.73 exemption. For example, for the pay period of November 20, 2004 to December 3, 2004, Charles Boneck earned an hourly rate of $6.95

because he worked 21.51 hours in excess of forty hours per week. For these 21.51 hours, Charles Boneck was paid $74.84.

For the LPS Manager and Zone Manager subclass, the Court need only determine whether they were properly classified as exempt under the administrative and/or executive exemptions of NRS 608.018. Whether or not these subclass members worked overtime is a point readily conceded by Lowe's. See Decl. of JMT, Ex. 1, 36:8-11; Decl. of JMT, Ex. 1, 179:9-15.

It is clear from the evidence that both the LPS Managers and Zone Managers had duties determined by their corporate office, and were conducted in a similar matter. Not only does Lowe's have job descriptions for these job titles, they also have performance guides to inform the Court of what was expected of them. The Court in *Krzesniak v. Cendant Corp.*, 2007 U.S. Dist. LEXIS 47518 (N.D. Cal. 2007), found a similar situation to this one: "All Sms [Store Managers] are subject to a single job description and Budget has promulgated written service standards that regulate business operations. Based on this evidence, the Court finds that it can more efficiently answer the question of whether Defendants' exemption of all SMs is correct through a class action than through case-by-case adjudication." *Id*. at 38-39. Similarly, the Court in *Tierno v. Rite Aid Corp.*, 2006 U.S. Dist. LEXIS 71794 *25 (N.D. Cal. 2006) held:

> As discussed earlier, the Court does not doubt that various factors, such as the size of a store or its location, may lead to variations in the merchandise stocked, the number of store staff, the volume of sales and the like. The Court is not persuaded, however, that these types of variations result in fundamental difference in the overall responsibilities and tasks of the Store Manager position itself.

See also *Whiteway v. FedEx Kinko's Office & Print Servs.*, 153 Lab. Cas. (CCH) P35,196 *15 (N.D. Cal. 2006) [holding that the Court can determine whether the Store Manager position could be classified as exempt based upon job descriptions].

In this case, the duties of the exempt subclasses were performed substantially by the class representatives. While Hart had some supervisoral role, he could not make decisions independently of his store manager. Andreas and Keefhaver had no supervisory role any greater than the role the non-exempt department heads. Nor could they affect any policy change without the direct approval of the store manager. For these subclasses the Court may

well, using the declarations of the class representatives, the testimony of Lowe's 30 (b) (6) Witness and the job descriptions determine whether or not the LPS Manager and Zone Manager subclasses were properly or improperly classified under the executive exemption.

In sum, a case based upon alleged failure to pay overtime due is exactly the type of action appropriate for certification as a class action. *See e.g., Romero,* 235 F.R.D. 474 (E.D.Cal.,2006) (certifying class of over 100 route drivers); *Chavez v. IBP, Inc*. 2002 WL 31662102, 4 (E.D. Wash.2002) (individualized issues did not predominate in action for unpaid wages); *Ladegaard v. Hard Rock Concrete Cutters, Inc*. 200 WL 1774091, 7 (N.D. Ill. 2000) (common issues predominate in action for unpaid wages).

Lowe's does not dispute that it did not pay any of the class members or plaintiffs Andreas, Hart, Keefhaver overtime. Nor does Lowe's dispute that it paid the class members or plaintiffs Becker, Boneck, Andreas and Keefhaver under the SPO Policy If Lowe's is ultimately found liable for failing to pay overtime, or illegally paying "Chinese Overtime," this case comes down to nothing more than a computation of the sums owed to each class member.

> In cases where the fact of injury and damage breaks down in what may be characterized as 'virtually a mechanical task' 'capable of mathematical or formula calculation,' 'the existence of individualized claims seems to offer no barrier to certification on grounds of manageability.'

Windham v. American Brands, Inc., 565 F.2d 59, 68 (4th Cir. 1977). As the members of the SPO Policy subclass had their hours tracked to the hundredth of an hour (See Decl. of JMT, Ex. 4), and as the LPS Managers and Zone Managers worked in accordance with time schedule set by Lowe's, computation of damages loading these hours into a computer program which is also programmed with the proper hourly rates which should have been paid under Nevada law.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that it's Motion for Class Certification be granted.

Dated: January 30, 2008

CLARK & MARKHAM LLP

By: /s/
David R. Markham, Esq.,
Attorney for Plaintiffs Donald Andreas, Ken Becker, Charles Boneck, Jerry T. Keefhaver, Jr., and William Hart

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 401 West A Street, Suite 2200, San Diego, CA 92101. I am readily familiar with the practice for collection and processing of documents through U.S. Mail.

On January 30, 2008, I served a true and correct copy of the following document described as:

1) **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION, MEMORANDUM OF POINTS AND AUTHORITIES**

2) **DECLARATION OF DONALD ANDREAS IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

3) **DECLARATION OF KEN BECKER IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

4) **DECLARATION OF CHARLES BONECK IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, AND ATTACHED EXHIBIT A**

5) **DECLARATION OF WILLIAM HART IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

6) **DECLARATION OF JERRY T. KEEFHAVER, JR., IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

7) **DECLARATION OF DAVID R. MARKHAM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, AND ATTACHED EXHIBIT A**

8) **DECLARATION OF JAMES M. TREGLIO IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND ATTACHED EXHIBITS 1-8**

__ BY U.S. MAIL:

I caused an envelope containing the above document addressed to the recipient set forth below, with postage thereon fully prepaid, to be placed in the United States mail at San Diego, California. I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service pursuant to which practice the correspondence will be deposited with the U.S. Postal Service this same day in the ordinary course of business (C.C.P. Section 1013(a); 2015.5):

X BY ELECTRONIC TRANSMISSION OF THE "NOTICE OF ELECTRONIC FILING": By electronically filing the document(s) through the Court's ECF filing system.

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_XX_ (Federal): I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made, and that the foregoing is true and correct under penalty of perjury.

Executed on January 30 2008 at San Diego, California.

James M. Treglio
CLARK & MARKHAM LLP